

Fifth Circuit Adds a Third Dimension to Title Insurance Claims

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Title insurance policies typically contain a "survey exception" that excludes coverage for certain title defects that cannot be discovered without a physical survey. In some jurisdictions, insurers also offer to waive that exception for insureds who provide a survey (and pay a higher premium). But the effects on coverage can be asymmetrical. In January 2014, in *Lawyers Title Ins. Co. v. Doubletree Partners*, the U.S. Court of Appeals for the Fifth Circuit held that the absence of a survey exception made the insurer liable for the insured's problems, even though an adequate survey would not reveal them. In 2006, Doubletree purchased 36 acres in Texas, planning to erect 18 multistory residences for seniors. Lawyers Title issued a title insurance policy on the property, and offered "more complete" coverage if Doubletree obtained a survey and paid additional premiums. As recently explained by the federal district court in New Hampshire in *Desjardins v. Fidelity Nat'l Title Ins. Co.*, "the precise location of boundary-defining monuments can only be determined by an examination of the property and an accurate survey," and so "title insurance policies frequently except coverage for boundary disputes," *unless* a survey is performed. Because Doubletree obtained a survey, Lawyers Title *eliminated* an exception for "discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping improvements." Part of the appeal of Doubletree's property was its proximity to a large lake, but this also made it subject to a "flowage easement," which permitted the U.S. government to flood areas with elevations below 537 feet. All parties knew of the easement, and the title policy specifically identified it as an exception to coverage. After consulting flood insurance rate maps, Doubletree's surveyor concluded that the easement affected only a small portion of the property, and the sale was concluded. Unfortunately, the maps were wrong: flood water *could* potentially cover the sites of several proposed buildings. Delays resulting from this problem ultimately caused Doubletree to default on its loan obligations, and the property was sold in foreclosure. Lawyers Title relied on three different provisions in contesting coverage; the Fifth Circuit held all three were ambiguous, and that coverage was required under the rule of *contra proferentem*. One term was the "survey coverage clause"—essentially, what

remained of the survey exception, after the language eliminated by Lawyers Title had been removed. To support its finding that the clause could reasonably be read to mandate coverage for a fully-disclosed easement, based on the surveyor's failure to determine correctly the elevation of the subject property, the court cited other cases that found coverage "when the defect [was] not revealed due to a survey error." In this case, Doubletree had filed a complaint against its surveyor with the Texas Board of Professional Land Surveying. The Board found that the surveyor had not violated any professional standards, and that the survey, however unfortunate, "appear[ed] to be adequate." Apparently, the independent measurement of elevation is not a standard component of a professional survey in Texas. Thus, the court found that removal of the survey exception obligated Lawyers Title to provide coverage for problems that an "adequate" survey would not disclose. The unusual facts of this case might limit its impact, but the implications are unfortunate, at best.

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